STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

GRANGE INSURANCE COMPANY OF MICHIGAN,
Plaintiff/Counter- Defendant/Appellant,

v

EDWARD LAWRENCE, Individually and Joint Personal Representative of the Estate of Josalyn A. Lawrence, and

LAURA ROSINSKI,
Individually and Joint Personal Representative of the Estate of Josalyn A. Lawrence,
Defendants-Appellees, and

FARM BUREAU GENERAL INSURANCE **COMPANY OF MICHIGAN,**
Defendant/Counter-Plaintiff-Appellee.

SC: 145206
COA: 303031
Muskegon CC: 10-047159-CK

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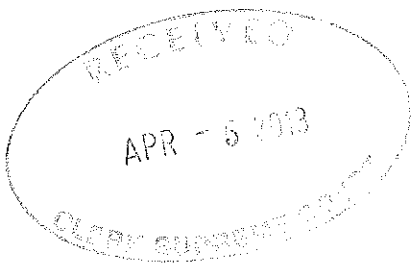

MOTION TO FILE AMICUS CURIAE BRIEF - STATE BAR OF MICHIGAN FAMILY LAW SECTION

AMICUS CURIAE BRIEF OF THE STATE BAR OF MICHIGAN FAMILY LAW SECTION

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STATEMENT OF QUESTIONS INVOLVED

I. Should domicile of children for no-fault insurance purposes be a factual determination? Is it true that domicile of children should not be established by a bright-line rule – especially through the use of domestic relations judgments or orders, which do not necessarily or accurately reflect a child's actual residence or domicile? While a domicile or residence reference in a domestic relations order may be considered as part of an overall factual analysis, is it true that it should not be controlling? Is it true that such an application may have negative effects on both domestic relations and insurance law?

Amicus answers Yes to the above questions.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Family Law Council ("The Council") is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of over 2,400 lawyers in Michigan practicing in the area of family law, and it is the section membership which elects 21 representative members to the Family Law Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts.

The Council, because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, has an interest in the development of sound legal principles in the area of family law.

The instant case involves the potential use of domestic relations judgments and orders as determinative of domicile of children for purposes of establishing priorities among insurers. The Family Law Section is concerned that the application of domestic relations orders to insurance-related issues presents problems for both domestic relations and insurance law as outlined in this brief.

INTRODUCTION

The instant case involves the potential use of domestic relations judgments and orders as determinative of domicile of children for purposes of establishing priorities among no-fault insurers. The Family Law Section is concerned that the application of domestic relations orders to insurance-related issues presents problems for both domestic relations and insurance law.

- The determination of domicile for adults under no-fault law is a factual issue. Domicile of children should likewise be a factual determination. Domicile of children should not be established by a bright-line rule – especially through the use of a domestic relations judgments or orders, which do not necessarily or accurately reflect a child's actual residence or domicile.
- Family law practitioners are concerned that domestic relations law may be adversely affected through its application or interpretation for insurance purposes.

STATEMENT OF FACTS

Amicus curiae is not providing a separate statement of facts because the facts set out in the parties' briefs are sufficient to address the legal issues.

ARGUMENT

I. Domicile of children for no-fault insurance purposes should be a factual determination. Domicile of children should not be established by a bright-line rule – especially through the use of domestic relations judgments or orders, which do not necessarily or accurately reflect a child's actual residence or domicile. While a domicile or residence reference in a domestic relations order may be considered as part of an overall factual analysis, it should not be controlling. Such an application may have negative effects on both domestic relations and insurance law.

Argument:

Judgments and orders in domestic relations cases involving children reflect the living arrangements of families at the time of the judgment or order. These are snapshots of a particular period. But, families in domestic relations cases are fluid over time – parents move, children grow older and move between their parents' homes. A judgment that may have accurately depicted a child's living arrangement at the time, may no longer be accurate several years, or even just months, after entry.

Obviously custody-related orders are not determined with reference to establishing domicile for purposes of no-fault insurance law, or for purposes of establishing priorities among or for the benefit of insurers. The predominant focus is the child. Custody and parenting time determinations are based on best interest of a child as determined under twelve (12) standardized, comparative factors. See MCL 722.23[1] of the Child Custody Act, MCL 722.21, *et seq*; MCL

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[1] The best interests factors of MCL §722.23 are:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed,

722.27(a)(1)(parenting time granted in accordance with the best interests of a child); MCL 722.27(a)(6)(discretionary factors related to parenting time).

In addition, custody law places great importance on identifying and preserving a child's "established custodial environment" when it is in the best interest of a child – but this concept is not the same thing as domicile or residence. See *Baker v Baker*, 411 Mich 567, 576-577, 309 NW2d 532 (1981)(preservation of established custodial environment, citing MCL 722.27(1)(c)). An established custodial environment exists with the person or persons the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, considering the child's age and physical environment and the permanence of the relationship between the child and the custodian. MCL 722.27(1)(c). In other words, "[a]n established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological

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if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence." *Berger v Berger*, 277 Mich App 700, 706, 747 NW2d 336 (2008).

A child may have an established custodial environment with one or both parents. A joint established custodial environment - where a child is bonded to and looks to both parents after divorce as custodians - is often the norm. And, an established custodial environment can exist in more than one home, *Rittershaus v Rittershaus*, 273 Mich App 462, 471, 730 NW2d 262 (2007), and with more than one parent, *Berger*, *supra*, 277 Mich App at 707. An established custodial environment is a factual inquiry, not dependent on the existence of custody orders, nor the manner in which such an environment became established. E.g., *Hayes v Hayes*, 209 Mich App 385, 387-388, 532 NW2d 190 (1995). Moreover, this determination is made after-the-fact, at a time when a party is requesting to modify a custody or parenting time order.[2]

Custody, domicile and parenting time are *modifiable* – in recognition of how families, their living arrangements, and circumstances change over time. See MCL 722.27(1)(c)[3]; *Vodvarka v*

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[2] Where the record supports an established custodial environment with both parents "*neither* plaintiff's nor defendant's established custodial environment may be disrupted except on a showing, by clear and convincing evidence . . . ." *Foskett v Foskett*, 247 Mich App 1, 8, 634 NW2d 363 (2001). Importantly, it is the child's standpoint, rather than that of the parents, that is controlling in determining whether the established custodial environment is with one parent or both. *Pierron v Pierron*, 486 Mich 81, 92-93, 782 NW2d 480 (2010).

[3] MCL 722.27(1)(c) provides authority for a court to "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child. The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be

Grasmeyer, 259 Mich App 499, 675 NW2d 847 (2003)(clarifying threshold issue of proper cause and change of circumstance before modification of custody) ; *Shade v Wright*, 291 Mich. App. 17, 805 N.W.2d 1 (2010)(discussing threshold criteria for modification of parenting time).

The terms "domicile" and "residence" have various meanings in domestic relations law. These terms are not the same thing as custody (see MCL 722.26 defining custody), and do not necessarily mean a child lives predominantly with one party. For example, MCL 722.31 controls change of domicile requests over 100 miles where the parties share joint legal custody, setting out criteria for the court to consider "with the child as the primary focus in the court's deliberations" MCL 722.31(4). Under MCL 722.31(1), "a child whose parental custody is governed by court order has, for the purposes of this section, *a legal residence with each parent.*" (Emphasis added).

Often parties or a court will include in custody provisions a designation that a child (or children) have a "primary physical residence" with one party. "Primary physical residence" or simply "physical residence" are not statutorily defined and have no specific meaning in domestic relations law. Furthermore, a reference to "primary" indicates that a child actually has a residence with both parties.[4]

On the other hand, many divorce judgments and custody orders do not mention "custody" at all, but merely set out the child's "parenting time" with each parent, in recognition of the facts that, despite divorce, the parents remain the parents of the children, and that the children have a home with each parent. This approach indicates that the parents (and presumably the child) see the

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considered. ..."

[4] And, consent orders entered by pro per parties may not necessarily reflect where a child actually lives.

child as sharing a home or domicile or residence with both parents.

Finally, if domicile and residence language in a domestic relations order is found controlling for no-fault insurance purposes, this would require judges and parties to address and consider effects on insurance as part of a custody decision – at a minimum, expanding considerations in domestic relations custody cases beyond what is in the best interest of a child based on the statutory best interest factors.

CONCLUSION:

Domicile of adults is a factual issue, as the parties have discussed in their briefs in this Court. In making a determination as to whether an individual is domiciled in the same household as an insured relative, this Court has identified factors which should be considered in making such a determination, including the intent of the individual to remain in the household, the formality of the relationship, whether the individual lives with the insured, and the existence of another place of lodging. *Workman v DAIIE*, 404 Mich 477, 496-497; 274 NW2d 373 (1979). These factors alone are not determinative, but must be "balanced and weighed with all the factors" being flexibly ... 'within the context of the numerous factual settings possible.'" *Workman, supra* at 496. Other factors which have been considered as relevant in determining domicile include: mailing addresses, whether the person maintains possessions at the insured's home; whether the insured's address appears on a person's driver's license and whether the person is dependent upon the insured for financial support and assistance. *Williams v State Farm*, 202 Mich App 491, 494-495; 509 NW2d 821 (1993).

While a domicile or residence reference in a domestic relations order may be considered as part of an overall factual analysis, it should not be controlling. As discussed above, a family

law judge's focus in determining custody is the statutorily-mandated best interest factors (listed above in footnote 1), and does not include considering priorities among no-fault insurers. As a result, a family law child custody order does not have, as its basis, the factual considerations that go into domicile for no-fault priorities purposes. Thus, a bright line test for children makes little sense, especially in light of the somewhat hazy definitions of domicile or residence in domestic relations orders and the established criteria for determining domicile under no-fault law.

RELIEF

The Family Law Section requests that this Court consider its position in deciding this case – that the domicile of children for no-fault insurance purposes should not be established by a bright-line rule through the use of a domestic relations judgments or orders.

Respectfully submitted,

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